

1 PAUL L. REIN, Esq. (SBN 43053)  
2 JULIE MCLEAN, Esq. (SBN 215202)  
3 LAW OFFICES OF PAUL L. REIN  
4 200 Lakeside Dr., Suite A  
Oakland, CA 94612  
Tel: (510) 832-5001  
Fax: (510) 832-4787

5 Attorney for Plaintiff:  
MERRITT BANKS

7  
8 UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

9 MERRITT BANKS,  
10 Plaintiff,

CASE NO. C06-3614 MHP  
Civil Rights

11 v.

12 **STIPULATION AND [PROPOSED]  
ORDER TO SUBSTITUTE PARTY**

13 MASH PETROLEUM, INC.; TOUN  
14 BOURK (a.k.a. BOURK TOUN) dba  
BAY STAR CAFÉ; JEAN LEE (a.k.a.  
JADE NGOR); and DOES 1-25,  
15 Inclusive,

Pursuant to F.R.C.P. 25(a)

16 Defendants.

17  
18 The parties to this action, through their respective attorneys of record, hereby  
19 stipulate and agree as follows:

20 MERRITT BANKS may no longer be a proper party to this action by reason of his  
21 death, as demonstrated by the Death Certificate attached thereto as Exhibit 1. Ann Marie  
22 Simmons is Mr. Banks's sister, and is the appropriate representative of MERRITT BANKS,  
23 under the standards of FRCP 25(a), as set forth in her declaration, filed herewith.

24 F.R.C.P. 25(a) governs the substitution of parties after a party has died. Rule  
25 25(a)(1) provides that the motion for substitution may be made "by any party or by the successors  
26 or representatives of the deceased party..." This has been interpreted by courts to mean that the  
27 proper representative does not have to be the administrator or executor of the deceased party's  
28 estate. Surviving relatives, and distributees of the deceased party's estate have been held to be

---

Stipulation and [Proposed] Order to  
Substitute Party: Case No. C06-3614 MHP

proper parties for substitution under Rule 25. (See, Sinito v. U.S. Dept. of Justice, D.C. Cir. 1999, 175 F.3d 512 at 516; Sequoia Property and Equipment L.P. v. U.S., E.D. Cal. 2002, 2002 WL 32388132.)

In construing Rule 25 to allow substitution of surviving spouses Mary Brick and Evelyn Adelman, the D.C. Circuit of Appeals Court held the following:

Appellants, in short, urge an inequitable application of Rule 25(a)(1) that finds no support in the rulemakers' design. See, e.g., Boggs v. Dravo Corp., 532 F.2d 897, 900 (3d Cir.1976) (purpose of the 1963 amendments to Rule 25(a)(1) was "to liberalize the Rule and to allow flexibility in substitution of parties"); Kilgo v. Bowman Transportation, Inc., 87 F.R.D. 26, 27 (N.D.Ga.1980) (same); National Equipment Rental, Ltd. v. Whitecraft Unlimited, Inc., 75 F.R.D. 507, 509 (E.D.N.Y.1977) (same). Several courts, including our own, have stated that the distributee of a distributed estate is a "proper party" for substitution under Rule 25(a)(1). See, e.g., Rende v. Kay, 415 F.2d at 985; Ashley v. Illinois Central Gulf Railroad Co., 98 F.R.D. 722, 724 (S.D.Miss.1983); cf. Kilgo v. Bowman Transportation, Inc., 87 F.R.D. 26, 27 (N.D.Ga.1980) (person named as executor in plaintiff's will, but who does not become executor because he elects statutory share rather than probating will, is a substitutable "proper party"). Sensibly construing Rule 25(a)(1), we hold that Mary Brick and Evelyn Adelman were "proper parties" for the McSurelys to substitute. (McSurely v. McClellan (D.C. Cir. 1985) 753 F.2d 88 at 98-99)

Thus it is clear that Rule 25 permits a successor or distributee to substitute into an action and does not restrict a proper party for substitution to the administrator or executor of the deceased party's estate. Ann Marie Simmons, Merritt Banks's sister, is his closest living relative and the sole distributee of his estate (which consisted only of a few personal belongings and furniture, and which did not go through any official "probate" process).

A similar situation was presented to Judge Thelton Henderson in the context of a contested motion, and the proposed representative for plaintiff was approved by Judge Henderson in his order, a copy of which is attached hereto as Exhibit 2.

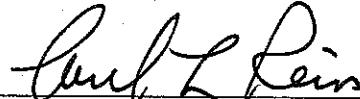
The parties therefore stipulate that Ann Marie Simmons, as legal representative of the estate of Merritt Banks, be substituted into this action in place of plaintiff MERRITT BANKS. The parties have reached a settlement, including a consent decree requiring appropriate disabled access access, which was approved orally by Merritt Banks to his attorney before his death but never signed by him, though signed by defendant Mash Petroleum Inc. and its attorney, Harvey Stein, and by plaintiff's attorney, Paul Rein. A copy is attached hereto as Exhibit 3. Plaintiff's attorney has represented to defendants that Ms. Ann Marie Simmons, as

1 legal representative of the estate of Merritt Banks, will approve this settlement once she has  
2 been authorized by the Court.

3

4 Dated: December 31, 2006

PAUL L. REIN  
JULIE MCLEAN  
LAW OFFICES OF PAUL L. REIN



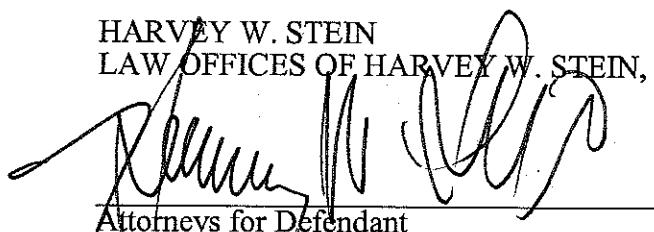
7 Attorneys for Plaintiff  
MERRITT BANKS

8

9

10 Dated: December 24, 2006

HARVEY W. STEIN  
LAW OFFICES OF HARVEY W. STEIN, P.C.



11  
12 Attorneys for Defendant  
13 MASH PETROLEUM, INC.

14

15

Dated: December \_\_, 2006

GENE BROWN  
FILICE BROWN EASSA & MCLEOD LLP

16

17

18

19

20

21

Pursuant to stipulation, and for good cause shown, IT IS SO ORDERED.

22

23

1/9/07

Dated: \_\_\_\_\_



24  
25 HON. MARILYN HALL PATEL  
U.S. DISTRICT JUDGE

26

27

28

LAW OFFICES OF  
PAUL L. REIN  
200 LAKESIDE DR., SUITE A  
OAKLAND, CA 94612-3503  
(510) 832-5001

Stipulation and [Proposed] Order to  
Substitute Party: Case No. C06-3614 MHP

1 legal representative of the estate of Merritt Banks, will approve this settlement once she has  
2 been authorized by the Court.

3

4 Dated: December 14, 2006

5

PAUL L. REIN  
JULIE MCLEAN  
LAW OFFICES OF PAUL L. REIN



6  
7 Attorneys for Plaintiff  
MERRITT BANKS  
8  
9

10 Dated: December \_\_\_, 2006

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

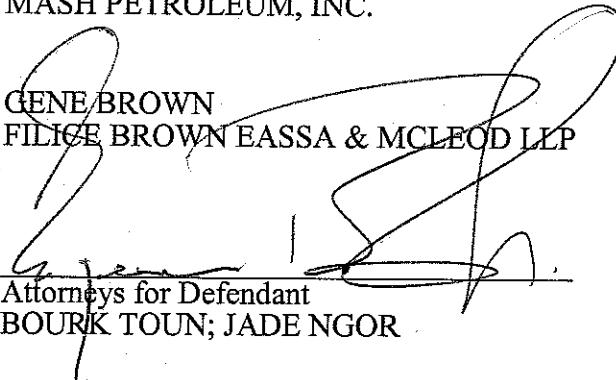
26

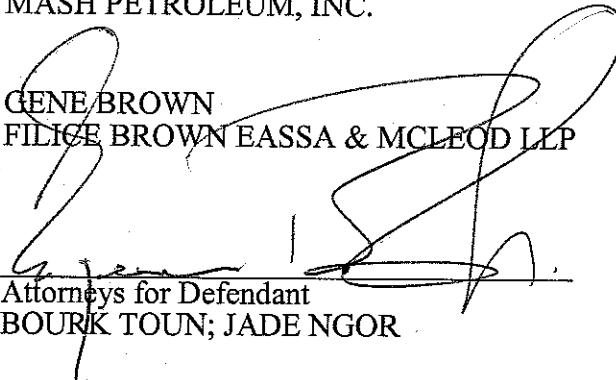
27

28

HARVEY W. STEIN  
LAW OFFICES OF HARVEY W. STEIN, P.C.

13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
Attorneys for Defendant  
MASH PETROLEUM, INC.

GENE BROWN  
FILICE BROWN EASSA & MCLEOD LLP  


Attorneys for Defendant  
BOURK TOUN; JADE NGOR  


**ORDER**

Pursuant to stipulation, and for good cause shown, **IT IS SO ORDERED.**

HON. MARILYN HALL PATEL  
U.S. DISTRICT JUDGE

LAW OFFICES OF  
PAUL L. REIN  
200 LAKESIDE DR., SUITE A  
OAKLAND, CA 94612-3501  
(510) 832-5001

Stipulation and [Proposed] Order to  
Substitute Party: Case No. C06-3614 MHP